78-1374

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. A-609

ANDY MARTIN,
Appellant,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, AND FRANK WANICKA, SHERIFF OF LEE COUNTY, FLORIDA,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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Appellees, THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, and FRANK WANICKA, SHERIFF OF LEE COUNTY, FLORIDA, move for dismissal of the appeal taken herein or, alternatively, for affirmance of the judgment of the Supreme Court of Florida for want of a substantial federal question and because the issues presented are so insubstantial that further argument is not required.

I.

STATE AND LOCAL ENACTMENTS INVOLVED

By enactment of the Florida Beverage Law, Chapters 561-565, Florida Statutes 1975, the legislature of the State of Florida has delegated portions of its Twenty-first Amendment powers to cities and counties.[1]

Section 562.45, Florida Statutes, expressly recognizes the right of local government "to enact ordinances regulating the hours of business and location of place of business, and prescribing sanitary regulations therefor, of any licensee under the Beverage Law within the corporate limits of such municipality."

Section 562.14(1), Florida Statutes, provides in part as follows:

> "(1) *Except as otherwise provided by county or municipal ordinance,* no alcoholic beverages may be sold, consumed, served, or permitted to be served or consumed in any place holding a license under the Division of Beverage between the hours of midnight and 7 a.m. of the following day. . . .
>
> "(2) The Division of Beverage shall not be responsible for the enforcement of the hours of sale *established by county or municipal ordinance.*" (emphasis added)

The county ordinance involved in this proceeding is reproduced in full in the appellant's jurisdictional statement.

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1. This delegation was noted in the opinion below. 348 So.2d at 919.

II.

ARGUMENT

Appellant presents no substantial federal question.

Within the past 10 years this Court has repeatedly been asked to assume jurisdiction of cases involving local regulation of topless, nude or "go-go" dancing and has consistently refused to review the identical issue presented by appellant in this proceeding. See, e.g., *City of Portland* v. *Derrington,* 253 Or. 289, 451 P.2d 111 (1969), *cert. denied,* 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969);[2] *Hoffman* v. *Carson,* 250 So.2d 891 (Fla.1971), *appeal dismissed,* 404 U.S. 981, 92 S.Ct. 453, 30 L.Ed.2d 365 (1971);[3] *Crownover* v. *Musick,* 509 P.2d 497 (Cal.1973), *cert. denied,* 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (1974).[4]

Appellant's basic First Amendment argument advances the mistaken premise that Lee County's ordinance is totally unrelated to the Twenty-first Amendment. The lower courts rejected this argument and rested their decision at least in part upon the state's legislative delegation of limited Twenty-first Amendment power to local governments. The district court of appeal said in part:

> "We recognize the limited areas within which local government can legislate; however, there is a distinct difference between enactments which govern conduct

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2. "Petition for writ of certiorari to the Supreme Court in Oregon denied."

3. "The appeal is dismissed for want of a substantial federal question. Mr. Justice Douglas is of the opinion that probable jurisdiction should be noted."

4. "Petition for writ of certiorari to the Supreme Court of California denied. Mr. Justice Douglas would grant certiorari."

of individuals while on the premises of their establishments, as opposed to the regulation of the licensees themselves in the sale and dispensing of alcoholic beverages....

* * *

"As in *Nelson*, the statutory scheme of state regulations does not embrace the area of conduct covered by the Lee County ordinance. We conclude that the ordinance now before us is one directed at the discipline and good order of persons while in establishments selling alcoholic beverages, and does not in any manner interfere or conflict with the state's regulation of the sale of such beverages." 348 So.2d at 919.

The precedent cited as a limiting construction of Florida's Beverage Law was *Nelson* v. *State*, 26 So.2d 60 (Fla. 1946), involving a city ordinance prohibiting barmaids from selling alcoholic beverages by the drink over the bar. There the Supreme Court of Florida distinguished the proper spheres of state and local authority over conduct in establishments licensed under the Beverage Law, saying:

"An authorized municipal regulation that does not infringe on the State's plan to license and regulate the sale of intoxicating liquors should not be held bad, absent an express purpose to do so. This is especially true when, as here, the State plan does not touch the phase regulated and the City has power to enact it. . . . We think the City had power to enact the law assaulted and that it is not in conflict with the State Beverage Act." 26 So.2d at 61.

The constitutionality of ordinances such as the one upheld below has been passed upon by a plethora of state court decisions outside Florida, only a few of which

are cited by appellant. Most courts which have considered this question have come out against at least the major First Amendment premise if not all constitutional objections raised in this case by appellant.[5] Perhaps the best common sense answer to his First Amendment challenge is the following commentary from the majority opinion in *Crownover* v. *Musick*, 509 P.2d 497, 510-511 (Cal.1973), *cert. denied*, 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489:

"It is clear that these provisions of the ordinances are directed at conduct—topless and bottomless exposure—and not at speech or at conduct which is 'in essence' speech or 'closely akin to speech'.

. . .

"Is such conduct symbolic in the constitutional sense? Is this nudity in bars and other specified places open to the public so inherently communicative by nature as to call for the protection given the 'interchange of ideas. . . .'? The questions seem to provide their own negative answers. Unless we wish to blind ourselves to what is happening in big cities with their 'topless' and 'bottomless' bars and 'nude live acts' in a tawdry atmosphere that blights the neighborhood if not the entire community, it is com-

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5. *Yauch* v. *State, City of Tucson*, 514 P.2d 709 (Ariz.1973); *Robinson* v. *State*, 489 S.W.2d 503 (Ark.1973); *Crownover* v. *Musick*, 509 P.2d 497 (Cal.1973); *Cheetah Enterprises, Inc.* v. *County of Lake*, 317 N.E.2d 129 (Ill.1974); *Wright* v. *Town of Huxley*, 249 N.W.2d 672 (Iowa 1977); *Major Liquors, Inc.* v. *City of Omaha*, 198 N.W.2d 483 (Nebr.1972); *People* v. *Moreira*, 333 N.Y.S.2d 215 (1972); *People* v. *Karns*, 365 N.Y.S.2d 725 (1975); *New York Topless Bar, etc.* v. *N.Y. State Liq. Auth.*, 398 N.Y.S.2d 637 (1977), *contra*, *Lucifer's Gate* v. *Town of Van Buren, etc.*, 373 N.Y.S.2d 304 (1975); *Salem* v. *Liquor Control Commission*, 298 N.E.2d 128 (Ohio 1973); *Wayside Restaurant* v. *City of Virginia Beach*, 208 S.E.2d 51 (Va.1974); *City of Seattle* v. *Hinkley*, 517 P.2d 592 (Wash.1973). A minority of jurisdictions has decided the issue in appellant's favor as discussed in his brief.

mon knowledge that such conduct is nothing more than a sales gimmick. It is delusive to speculate in the face of these realities that the entertainment in this milieu will acquire protectible communicative properties by exposure of the genitals, pubic area or female breasts of the performers. *Assuming,* arguendo that there may ensue in instances an expression which is communicative in the constitutional sense, we do not think it is unreasonable to regulate the *form,* or *manner* of the communication." (emphasis in original)[6]

Appellant suggests, at page 12 of his jurisdictional statement, that this Court "has never directly addressed a First Amendment claim as it applies to topless dancing, per se." While that statement may be true as phrased, it at best overlooks the characterization this Court placed upon *LaRue* in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), as shown by the following quotation:

> "In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program." 422 U.S. at 932.

Appellant's first point is best disposed of by the following paragraphs from the opinion below, the first of which

6. The *Crownover* majority opinion also measured the ordinances under review according to the fourfold test prescribed by this Court in *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and found them to meet all four requirements. See discussion at pp. 511-512.

is quoted by the Florida court from Oregon's *City of Portland* decision:

> "When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is a fit subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours. 451 P.2d at 113.
>
> "We agree. Adult females who choose to display their breasts in public to patrons in a bar, or who are required to do so by their employer, are engaged in conduct incident to a commercial endeavor. They are not expressing their right of free speech or expression." 348 So.2d at 918-919.

As to appellant's second point, appellees agree that the equal protection argument is novel, but not that it is substantial.[7]

Appellant's precise argument has been specifically addressed by at least one state court of last resort. In *Robinson* v. *State*, 489 S.W.2d 503 (Ark.1973), the Arkansas court took a common sense approach to the equal protection argument, saying:

> "It is a matter of common knowledge that the male species of homo sapiens are not physically equipped for carrying out the specific exhibition with which the appellants were charged in this case."

If topless dancing by males becomes popular in Lee County at some future date and is employed as a sales

7. Equal protection arguments in these cases are usually founded upon the more orthodox challenge to classifications based upon the type of establishments involved. See, for example, *Wayside Restaurant* v. *City of Virginia Beach* and *Major Liquors, Inc.* v. *City of Omaha*, supra, footnote 5.

promotional device by appellant or others, it may be presumed that the county will give attention to the problem.[8] Until then, the undeniable difference between male and female anatomy surely affords a rational basis for classification. The suggestion that this point presents a substantial federal question is frivolous.

III.

CONCLUSION

The judgment below should be affirmed or the appeal dismissed.

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8. ". . . where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view . . . that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." White, J., in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830, 842 (1973).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by regular United States Mail, postage prepaid, to Steven Carta of SMITH & CARTA, Post Office Box 2446, Fort Myers, Florida 33902, on this 3rd day of April, 1979.

JULIAN CLARKSON
Member of the Bar of the Supreme Court of the United States

APPENDIX

Section 562.14, Florida Statutes 1975

562.14 Regulating the time for sale of alcoholic and intoxicating beverages.—

(1) Except as otherwise provided by county or municipal ordinance, no alcoholic beverages may be sold, consumed, served, or permitted to be served or consumed in any place holding a license under the Division of Beverage between the hours of midnight and 7 a.m. of the following day. This section shall not apply to railroads selling only to passengers for consumption on railroad cars.

(2) The Division of Beverage shall not be responsible for the enforcement of the hours of sale established by county or municipal ordinance. . . .

Section 562.45, Florida Statutes 1975

. . .

(2) Nothing in the Beverage Law contained shall be construed to affect or impair the power or right of any incorporated municipality of the state hereafter to enact ordinances regulating the hours of business and location of place of business, and prescribing sanitary regulations therefor, of any licensee under the Beverage Law within the corporate limits of such municipality.